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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF COLORADO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

No party disputes that a D.C. Circuit decision applying *de novo* review to an agency's exercise of remedial discretion would conflict with the decisions of other circuits and would raise an important, recurring issue of administrative law meriting this Court's review. Nor does anyone question the magnitude of the potential refund liability imposed retroactively by the court—nearly half a billion dollars—or its disruptive effect on producers and royalty owners who acted throughout the relevant period pursuant to agency orders expressly authorizing the conduct at issue.

In questioning the issue's certworthiness, Public Service Company of Colorado ("PSCC")[1] asserts, and the Solici-

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[1] PSCC's brief in opposition is joined by both Cheyenne Light, Fuel and Power and the Missouri Public Service Commission. For simplicity, we refer to these parties jointly as PSCC.

tor General intimates, that the decision rests on the peculiar terms of a repealed statute, under which Congress supposedly required automatic refunds in all cases and stripped the agency of its normal remedial discretion. But that view, as FERC argued persuasively in its court of appeals rehearing papers, both misreads the court's opinion and misconceives the NGPA.

1. There is *nothing* in the D.C. Circuit's opinion to suggest that the court's remedial analysis rested on some quirk in the NGPA that automatically and universally requires refunds. On the contrary, the court of appeals grounded its determination in its understanding of general principles of administrative law—in particular, its view that an agency lacks discretion to limit refunds in the absence of "detrimental reliance" (as narrowly defined by the court). Pet. App. 23a. As FERC correctly stated in its rehearing papers, the court's "detrimental reliance" analysis would have made "no sense had the panel believed the NGPA deprives the Commission of any authority to limit refunds."[2] In that case, refunds would have been mandatory without regard to whether there had been such reliance.

PSCC nonetheless professes to find in the opinion evidence that the court of appeals adopted this view of mandatory refunds. But it relies only on an artfully cropped fragment of language lifted from the court's *description of PSCC's argument*, and it implies—inaccurately—that the passage reflects the *court's own view* as well. This is evident if one compares the relevant portion of the court's opinion with PSCC's selective quotation (which omits the italicized words):

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[2] Reply of the Federal Energy Regulatory Commission to Responses to Petition for Rehearing and Suggestion for Rehearing *In Banc* at 2. This reply was lodged with the D.C. Circuit, but the court ultimately denied FERC's motion for leave to file it.

Court's Opinion (Pet. App. 22a)	PSCC Opposition (at 8)
In support of making the Commission's decision retroactive to 1983, PSCC offers a different account . . . of the transition from the NGA to the NGPA. In this version the key point is that the Commission does not have the expansive remedial powers under the NGPA that it wielded under the NGA, 15 U.S.C. § 717c(e). Specifically, whereas the NGA gave	This critical distinction in regulatory regimes was not lost upon the court below: [T]he key point [made by PSCC] is that the Commission does not have the expansive remedial powers under the NGPA that it wielded under the NGA, 15 U.S.C. § 717c(e). Specifically, whereas the NGA gave . . . .

The fact is that the court did *not* endorse PSCC's argument. Instead, having recounted the competing positions of all parties, the court went on to explain its *own*, quite different view of the case. "As we see the issue," the court stated, the "crucial point" is the supposed "lack of detrimental reliance." Pet. App. 23a. That view not only differs from, but also conflicts with, PSCC's theory.

2. Nor is there any support for the claim that the NGPA uniquely constrains agency authority to limit refunds. Neither PSCC nor the Solicitor General—who, hedging his bet, says only that there may be "some basis" for such a limitation (FERC Opp. 8)—can point to *any* statutory text that even arguably requires automatic refunds in all cases. No such text exists. On the contrary, as FERC correctly told the court of appeals, the NGPA (whose "necessary and proper clause," 15 U.S.C. § 3411(a), provides the exclusive source of the Commission's power to award refunds under that statute) confers remedial discretion that is, "if anything, *even broader* than under the [Natural Gas Act]." [3]

That the NGPA imposed ceiling prices for specific categories of natural gas does not alter the analysis. Contrary to PSCC's assertion, Congress did not confine FERC to the "limited task of determining when collected prices ex-

[3] FERC Petition for Rehearing and Suggestion for Rehearing *In Banc* at 14 n.5 (emphasis added).

ceed the statutory limits." PSCC Opp. 8. Rather, it delegated to FERC the traditional authority to interpret and apply provisions that fall short of perfect clarity. The statutory question before FERC in this case, for example, was whether a particular state tax qualified as a "severance, production, or similar tax, fee, or other levy imposed on the production of natural gas." 15 U.S.C. § 3320(c). The answer to that question, as the D.C. Circuit acknowledged, required the agency to construe inherently "ambiguous" terms. Pet. App. 6a.

The hidden premise of PSCC's argument is that, if FERC changes its interpretation of such terms (as it surely is entitled to do), it must automatically recalculate the statutory ceiling prices retroactively and require refunds as if the new interpretation had been in effect all along. PSCC's theory presupposes that there can be only one right answer to the statutory question, and that the agency must mechanically apply its most recent interpretation both prospectively and retrospectively without any regard for equitable considerations.

As this Court's decisions make clear, however, there may be more than one reasonable interpretation of ambiguous statutory terms. If an agency initially adopts one interpretation but later changes its mind and adopts a new interpretation, the courts must defer to *both* interpretations if both are reasonable. *See Rust v. Sullivan,* 500 U.S. 173, 186-87 (1991); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 862-64 (1984). Just as "[a]n initial agency interpretation is not instantly carved in stone," and an agency need not "establish rules of conduct to last forever," *Rust,* 500 U.S. at 186 (internal quotations omitted), a *new* interpretation need not be given rigidly *retrospective* effect when, as here, the result would be to penalize those who properly conformed their behavior to the original interpretation. To conclude otherwise would conflict with the theory of *Chevron* deference and would undermine an agency's "latitude to adapt [its]

rules and policies to the demands of changing circumstances." *Id.* at 187 (internal quotations omitted).

3. Although respondents question whether the D.C. Circuit actually engaged in *de novo* review (PSSC Opp. 5-6; FERC Opp. 7-8), any other conclusion is wholly implausible. The court plainly conducted an independent remedial analysis, concluding on its own that "detrimental reliance" was the lone "crucial point" and that there was no such reliance in this case. Pet. App. 23a. Similarly, without even mentioning—much less deferring to—FERC's contrary understanding of the NGPA, the court independently decided that enactment of the NGPA made any later reliance "unreasonable." Pet. App. 24a.

PSCC imputes significance to the court's statement that, "[a]bsent detrimental and reasonable reliance," it would be "capricious" for the agency to forgo refunds "without any justification at all." *Id.* But that demonstrates only that the court was prepared to label "capricious" any result that differed from its own conclusion, reached after an independent analysis of "detrimental" and "reasonable" reliance. This is not the way a court behaves when it is reviewing under a rational-basis or abuse-of-discretion standard an agency's exercise of discretionary authority.

PSCC asserts that the result in this case would have been no different under the deferential standard of review applied by other circuits. PSCC Opp. 5. It rests that assertion on the D.C. Circuit's statement that any reliance on the agency's orders after enactment of the NGPA "would have been foolhardy." Pet. App. 24a. But FERC itself reached precisely the opposite conclusion, specifically finding that reliance on its orders was entirely "justifiable" until 1988. Pet. App. 78a. That was so, FERC explained, because (1) the NGPA's terms and underlying legislative history gave every reason to believe that "the prior characterization of the Kansas tax would carry over under the NGPA," and (2) FERC itself, in orders entered *under* the NGPA, expressly and repeatedly relied on its pre-NGPA

Kansas tax ruling to hold that other state taxes qualified as "production or severance" taxes. *Id.*

The D.C. Circuit nowhere addressed FERC's analysis. Its conclusion that continued reliance was unjustified reflects, not a deferential review of the agency's plainly reasonable contrary findings about the statute it administers and its own prior decisions, but a *de novo* determination by the court itself. It is inconceivable that the outcome would have been the same had the court applied the deferential standard of review that prevails in other circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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